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While it appears that both ABS and LLPs will be approved by the Arizona Supreme Court as complex regulations have been released to implement both, I appreciate the fact that the Court is continuing to accept comments on both proposals. I offer the following additional comments.

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#### Alternative Business Structures (ABS).

The concept of ABS is that if only nonlawyers could own all or parts of law firms, tremendous additional investments could be made and innovations implemented in law firms which will inure to the benefit of all Arizonans, including middle and low-income consumers who cannot currently afford the legal fees of lawyer-only owned legal practices. In order to allow these investments and innovations, the Arizona Supreme Court's decades old rule of professional conduct prohibiting non-lawyer ownership of law firms must be repealed. Arizona desires to be the first U.S. jurisdiction to repeal this rule. The claim is made that many other rules of professional conduct already do or will adequately protect the independent professional judgment of Arizona lawyers on behalf of their clients. Allowing nonlawyers to own all or parts of law firms will benefit everyone by allowing law firms to expand and improve their delivery of legal services across the spectrum of those services. Access to justice for all Arizonans will be enhanced without impacting the quality and integrity of the legal and other services being provided by law firms owned in whole or in part by nonlawyers.

Arizona ER 5.4 was adopted to protect the independent professional judgment of Arizona lawyers on behalf of their clients; it was not adopted to protect lawyers from competition by nonlawyers in the delivery of legal services or to restrict the ability of lawyers to innovate to meet market demands.

I submit ER 5.4 was adopted to ensure the independent professional judgment of lawyers on behalf of their clients, not to protect lawyers from competition from nonlawyers in the delivery of legal services or to prevent lawyer innovation in the delivery of legal services.<sup>1</sup> It appears to me that the impetus behind the movement to repeal ER 5.4 is not the light bulb realization that other rules adequately protect the independent professional judgment of lawyers on behalf of their clients and that ER 5.4 is therefore no longer needed, but financial opportunity. While two U.S. jurisdictions have modest nonlawyer ownership rules, no U.S. jurisdiction has repealed its

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<sup>1</sup> In an article in favor of ABS in the April 2020 edition of the *Arizona Attorney*, attorney Whitney Cunningham states, at page 34, "Ethics rules such as ER 5.4, by design, are intended to restrict the ability of lawyers to deploy innovative solutions to meet market demands." No evidence is provided to support the assertion that Arizona ER 5.4 was so designed. The comments to ER 5.4 certainly do not support it.

version of ER 5.4 to date. It appears to me that the Court is rushing to “innovate” when the reality is that the access to justice needle will not be meaningfully moved by this “innovation”. The authorization of ABS and LLPs only adds additional layers of regulation to a justice system already overloaded with rules and regulations. The answer to more justice for middle and low-income citizens is not more regulation or allowing nonlawyers to own law firms. It is the simplification of the law in the areas that affect them most. Simplification would be much more meaningful in the long-term than throwing more service providers or nonlawyer investors into the mix.

ABS changes nothing when it comes to the complexity of the law.

Nothing changes the mind-numbing complicity of the law by the authorization of ABS. ABS is just another way to deliver legal services that most people will continue not to be able to afford and who frequently just give up when faced with a disagreement with a landlord, lender, or other creditor with the resources to win regardless of the actual legal merits of their competing positions. With or without ABS, the legal system will just continue to grind on.

What evidence exists that ABS will meaningfully reduce the cost of obtaining legal services so that more middle and low-income citizens will seek those services?

ABS appear to be touted, at least in part, for their potential to benefit middle and low-income citizens in obtaining legal services which private practitioners have had serious difficulty in providing due to the high level of their legal fees.<sup>2</sup> The suggestion is that ABS will allow law firms to obtain the services of many other disciplines – accountants, information specialists, managers, for example – which will free up the time of lawyers to practice law. And more lawyers actually practicing law rather than handling the managerial and administrative sides of their practices can only benefit more people than current restrictions allow them to provide. The problem with this argument is that modest evidence supports that ABS will reduce the cost of legal services so that the “access to justice gap” will be closed in any meaningful way. Allowing nonlawyers to own, manage and control law firms does nothing to change the economic fundamentals of operating any viable business. Income must exceed expenses. Nonlawyer investors need to be paid a return on their investment and nonlawyer participants need to be paid just like lawyers. Nothing prevents current lawyer-only owned law firms from hiring outside consultants or employees to perform the managerial and administrative duties that take lawyers away from practicing law. The bottom line – whether a law firm is lawyer-only owned or nonlawyers are allowed to own or co-own it – is a reasonable return on investment. ABS do nothing to alter this fundamental of owning and operating a viable business. ABS will not reduce legal fees so that they are suddenly

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<sup>2</sup> The task force report and petitions lead me to believe that ABS is being touted to help close the “access to justice gap” in Arizona. It appears some proponents suggest ABS has nothing to do with access to justice. If “innovation” is the core selling point for ABS, who, exactly, are the intended beneficiaries?

more affordable to the bulk of Arizona citizens.<sup>3</sup> Modest data has been provided that that they will. Proponents of ABS have mostly offered that they may or could.<sup>4</sup>

The Governor and Legislature are pursuing occupational deregulation at the same time the Supreme Court is establishing complex new regulatory regimes for ABS and LLLP.

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<sup>3</sup> The proponent submission by Stanford Law School includes the admission that the use of technology is highly capital-intensive. Letter dated March 30, 2020, page 3. The suggestion is that nonlawyer investment will allow law firms to employ more technology to provide the necessary economies of scale to deliver more affordable routine legal services. So expensive technology will reduce the cost of routine legal services? I am not talking about legal forms that consumers get to choose and take the risk of choosing wrong. I am talking about legal services provided by lawyers in ABS.

<sup>4</sup> In an article by Judith A. McMorrow entitled “*UK Alternative Business Structures for Legal Practice: Emerging Models and Lessons for the US*”, Georgetown Journal of International Law 47, no. 2 (2016): 665-711, she notes at pages 679-680, “A third factor accelerating change in the U.K. legal services market is the recent ban on referral fees and the significant retrenchment in state-funding of legal services. These changes are pushing the United Kingdom closer to the U.S. model of vast unmet legal needs with inadequate funding to provide traditional legal services. One promise of ABS firms was the possibility of offering more affordable legal services to middle and low-income clients, particularly in areas that could be more easily commoditized. Early data suggests that ABS firms are not at the moment helping to fill this void. That being said, there are some ABS models discussed below that hold some promise to make legal services more readily available and affordable, if allowed to percolate and experiment.” (footnotes omitted). It is now 2020. The proponents of ABS need to provide concrete data that the promise of ABS for the provision of more affordable and accessible legal services have been delivered in the United Kingdom to the extent Arizona should implement ABS in order to deliver similar results. Where are the ABS mentioned in Ms. McMorrow’s article today? It looks like Riverview Law was acquired by Ernst and Young in 2018. How many middle and low-income clients does Ernst and Young serve? Co-Operative Legal Services may be a success story, but a sample of its fees include representation in a contested divorce starting at 180 pounds (VAT included) per hour. That is about \$222 an hour. As mentioned elsewhere in the main text, the minimum wage in Arizona is currently \$12 an hour. How many middle and low-income Arizonans can hire any service provider charging \$222 an hour?

Ms. McMorrow’s article goes to state, at page 708, “While there is theoretical concern that non-lawyer owners and investors will dilute the lawyer’s professional obligations to clients, the business incentives for client satisfaction and contract renewal provide a check on self-dealing.” These concerns are hardly theoretical. Of many examples, ask the customers who were the victims of Wells Fargo’s fake account scandal if their satisfaction checked the bank’s self-dealing. Wells Fargo has an elaborate code of ethics that is available online.

In an article in the April 2020 edition of the *Arizona Attorney*, Professor Daniel B. Rodriguez states, at page 28, that “Even among enthusiasts of nonlawyer ownership, as I am, we must candidly admit that we do not yet know whether the access to justice needle will be moved by permitting nonlawyer ownership. The evidence from the United Kingdom is ultimately indeterminate, even a dozen years after enactment of the Legal Services Act that, among other reforms, permits nonlawyers to work with lawyers to form alternative business structures.”

The study mentioned in Crispin Passmore’s article in the April 2020 edition of the *Arizona Attorney* (pages 42-47), entitled *Impact Evaluation of [Solicitors Regulation Authority] Reform Programme*, does provide an evaluation of ABS in the United Kingdom to April 2018 (pages 11-25). My read is that their impact on the delivery of lower cost legal services to middle and low-income citizens has been very modest (“Most of the reforms are “upstream” of consumers; most effects on consumers will therefore be indirect.”). The report’s comments on Co-Operative Legal Services, mentioned above, are less generous than mine (“The expansion of services by Co-Op Legal has not fulfilled expectations.”). Even the touted benefits of nonlawyer investment in law firms have been modest.

Both the ABS and LLLP regimes appear to be at odds with the direction Arizona's executive and legislative branches are taking to deregulate rather than reregulate occupational licensing. See, for example, Governor Ducey's Executive Order 2020-02 (Moratorium on Rulemaking to Promote Job Creation and Economic Development; Implementation of Licensing Reform Policies). The Arizona legislature has considered and continues to consider occupational licensing deregulation as recommended by various groups including the Goldwater Institute (Report entitled *Protection Racket: Occupational Licensing Laws and the Right to Earn a Living*), the Institute for Justice (Report entitled *License to Work: A National Study of Burdens from Occupational Licensing*), and the American Legislative Exchange Council. A February 16, 2018 article in the *Arizona Capitol Times* by Rachel Leingang entitled *Legislature joins push to delicense, deregulate all sorts of professions and jobs* captures the activity to that date. A 2015 report by the U.S. Departments of the Treasury and Labor entitled *Occupational Licensing: A Framework for Policymakers* includes the recommendation that "State legislators and policymakers should adopt institutional reforms that promote a more careful and individualized approach to occupational regulation that takes into account its costs and benefits, and harmonizes requirements across States."

ABS add a complex regulatory structure to the Supreme Court's already complex regulation of the practice of law. With one hand, ABS is touted for its potential to reduce the "access to justice gap" in Arizona, and with the other the Court will impose complex requirements on the establishment and operation of ABS. That ABS will become substantially more efficient and effective than lawyer-only owned law firms and the cost of legal services will meaningfully decrease through the operation of this complex regulatory scheme appears to me to be hope rather than evidence based.

Perhaps the Court has already vetted these two new regulatory regimes with the Governor and Legislative Leadership. If not, a serious regulatory conflict could be in the offing. On the one hand ABS could be sold as deregulation (repealing and amending a number of existing ethics rules) in the name of competition, innovation, and access to justice, but the complex regulations to implement ABS are anything but.

#### Are ABS compliance procedures adequate to protect both clients and the public?

The ABS regulatory regime is based on nonlawyer compliance with detailed rules of professional conduct similar to those which lawyers are required to comply with. The argument is that ABS will be no more susceptible to ethical misconduct than current lawyer-only owned law firms. The lynchpin to ensure this compliance is the compliance attorney. The compliance attorney must take reasonable steps to, among other things, ensure ABS equity interest holders, whether owners, managers or decision-makers, do not cause or substantially contribute to a breach of the regulatory requirements and Code of Conduct applicable to these individuals. The compliance attorney is to ensure that a prompt report is made to the State Bar of Arizona of any facts or matters reasonably believed to be a substantial breach of the regulatory requirements in the code and ensure that the state bar is promptly informed of any fact or matter that reasonably should be brought to the state bar's attention in order that it may investigate whether a breach

of regulatory or ethical requirements has occurred. The compliance attorney is subject to being summarily suspended as a compliance attorney for failing to comply with the foregoing duties.

Proposed amended ER 8.3 requires lawyers to report misconduct by other lawyers, ABS, and LLPs in certain circumstances. The proposed regulations go beyond what a compliance attorney is required to report under proposed ER 8.3. The compliance attorney appears to be placed in an untenable position of deciding between complying with his or her reporting duties and his or her employment and promotion within the ABS. Report your employer at the risk of your job; do not report your employer at the risk of your ability to serve as a compliance attorney (if not also your license to practice law). What about some type of employment protection for ABS compliance attorneys and mandatory proactive management (PBMR) requirements for ABS?

The United Kingdom ABS regime also requires ABS to have a compliance officer for finance and administration. It is not clear to me why the proposed Arizona ABS regulations do not include this position which seems as important as that of compliance attorney. The proposed Arizona ABS regulations are already very complex, but if effective oversight of ABS is a primary goal, a finance and administration compliance officer position should be a part of Arizona's ABS regime.

I have found no discussion of how Arizona ABS will deal with their multi-state admitted lawyers who are subject to rules of professional conduct that do not allow ABS. Unlike the United Kingdom which has implemented ABS on a national basis, what ethical land mines exist for multi-state admitted lawyers in Arizona ABS? Perhaps ER 8.5 is up to the task of sorting these conflicts out, but does every U.S. jurisdiction have the same rule? After a quick check, Nevada and New Mexico do not.

The state bar and other regulatory authorities are also tasked with investigating and taking appropriate action against noncomplying ABS and their authorized persons. No information has been provided as to how many ABS are estimated to be licensed in Arizona in the initial year of establishment (or beyond) and how the cost of this regulatory oversight will be paid for by fees from ABS. Recall that one of the basis for the establishment of ABS in Arizona is to remedy the "access to justice gap." The cost of regulatory compliance by ABS impact the cost of the legal and other services they will provide.

#### ABS on a trial rather than wholesale basis.

The task force's preference is to authorize ABS on a wholesale rather than on a trial basis (though it does not oppose the latter). I urge the Court to authorize ABS on a trial basis. This would help ensure ABS can deliver on their promises. Why not extend an invitation to would-be ABS to offer concrete proposals for the delivery of legal and other services through the ABS? A request for proposals process. Firms like Jacoby & Meyers, Ernst and Young, Walmart, Costco, Amazon, Microsoft, McKinsey & Company, Legal Zoom, and Rocket Lawyer, among potentially many others, may submit an ABS proposal. If approved by the Court, all interested constituencies – the courts, the bar, the executive and legislative branches, and the general public – could evaluate the new approved structures during the trial period to validate the promise of more efficiency

and effectiveness in the general delivery of legal services and the reduction of the “access to justice gap” in Arizona without any adverse impact on their clients and the public interest in general.

I believe a trial period implementation of ABS is a more prudent approach considering that no other U.S. jurisdictions currently allows ABS (with the very limited exceptions of Washington, D.C. and Washington State). Further, if ABS is the next great innovation in the regulation of the practice of law, why not partner with sister state Utah to harmonize the regulation of ABS between Arizona and Utah for the benefit of the citizens of both states using the same process? Why couldn't Arizona and Utah come to agreement about how to implement ABS and then do so together?

One final suggestion regarding the implementation of ABS. Why not limit the first round of ABS approvals to ABS that will focus their practices on providing legal services to clients with household incomes at or below the median household income of Arizonans? “PeopleLaw” ABS. If these ABS demonstrate that they can deliver on their lower cost, access to justice, promises, the Court can decide to allow ABS on a broader scale.

#### Limited License Legal Practitioner (LLLP).

Many of my comments applicable to ABS also apply to the LLLP regime. A new category of legal service provider does nothing to simplify the law. While the dollar (hourly or flat fee) cost of using the services of an LLLP may be lower than the cost of obtaining similar services from an Arizona attorney, that cost will continue to be more than most middle and low-income citizens can afford to pay. I believe an example was given of a legal document preparer that charges \$75 per hour for her services. The minimum wage in Arizona is \$12 an hour. The coronavirus pandemic has disrupted and will continue to disrupt for a considerable period of time the ability of Arizonans to obtain and maintain gainful employment. Proponents of the LLLP regime have not provided any data to show how it will meaningful address the unmet legal needs of middle and low-income Arizonans. Many will still not be able to afford a service provider charging \$75 an hour.

Proponents of the LLLP regime have not provided any data as to how many unemployed and underemployed attorneys there are in Arizona and have offered no plan to better utilize these professionals to meet the unmet legal needs of middle and low-income citizens. No data has been provided as to Arizonans' utilization or underutilization of legal document preparers. A complex new regulatory scheme is created to license yet another tier of legal service provider – the LLLP – on top of the existing regulatory schemes for attorneys and legal document preparers. As mentioned regarding ABS, the Supreme Court is creating new regulatory regimes while the Governor and legislature are seeking to deregulate occupational licensing.

While Washington State's experience demonstrates that it has overregulated its independent legal technician regime such that very few legal technicians are actually providing legal services to Washingtonians after several years of such licensing, an examination of the proposed Arizona LLLP regulations reveals a complicated and costly process to obtain and maintain an LLLP license.

It is not clear to me how the proposed Arizona LLLP regime is less complicated than Washington's such that more licenses will be issued in Arizona than Washington over a comparable period of time so that more affordable legal services will in fact be available to Arizonans than Washingtonians.

### Conclusion.

I believe core ethics requirements that meaningfully protect clients are on the cutting block in the name of innovation and access to justice. It is represented that other rules already do or will protect the same interests, and nothing will change. We'll see.

While I do not believe the benefits of ABS and LLLPs will outweigh their costs and that neither will meaningfully move the needle in closing the access to justice gap, should the Court approve both, I urge a trial period implementation of ABS, enhanced protections for compliance attorneys, and the establishment of the position of compliance officer for finance and administration to better ensure ABS compliance with all applicable regulatory requirements.

I also urge the Court to reduce the regulatory requirements for LLLPs so that Washington State's experience is not repeated in Arizona. If the Court wants more people to help more people resolve their legal issues at a reasonable cost, the requirements to obtain and maintain an LLLP license need to be seriously reduced. If experience demonstrates that more regulation is required, it can be done incrementally. The proposed regulation of LLLPs looks too much like the regulation of lawyers to be justified as streamlining and expanding the delivery of legal services to more Arizonans than the current rules allow.